**COMMONWEALTH OF KENTUCKY**
**SUPREME COURT OF KENTUCKY**
**FILE NO: 2013-SC-00254-D**
**(2012-CA-001768-DR)**

**B.H., A CHILD UNDER EIGHTEEN** **APPELLANT**

*VS.* *On Discretionary Review from the Kentucky Court of Appeals*

**COMMONWEALTH OF KENTUCKY** **APPELLEE**

# BRIEF FOR APPELLANT

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 22, 2014, the foregoing "Brief for Appellant" was served by first class mail upon the following: Hon. Robert Johnson, Chief Regional Judge, Woodford Circuit Court, Scott County Justice Center, 119 N. Hamilton St., Georgetown, KY 40324; Hon. Vanessa Dickson, Judge, Woodford County District Court, 310 Main St. Paris, KY 40361; Hon. Alan George, Woodford County Attorney, 103 S. Main Street Room 300, Versailles, KY 40383; Hon. Gordie Shaw, Commonwealth Attorney, 187 South Main Street, Versailles, KY 40383; and via state messenger mail to: Hon. Jack Conway, Attorney General, Office of the Attorney General, Capital Center Complex, 1024 Capital Center Drive, Frankfort, KY 40601. The record was not checked out in preparation of this Brief for Appellant.

John Wampler

## INTRODUCTION

This is a case involving a fifteen-year-old juvenile who was charged with misdemeanor and felony sex offenses for engaging in voluntary sexual activities with his thirteen-year-old girlfriend. This raises issues as to the protections that should have been afforded the juvenile via his rights to due process and equal protection under both the United States Constitution and the Constitution and laws of this Commonwealth, as well as the intent of the Kentucky Legislature when enacting the statutes under which the juvenile was charged.

## STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument, as he believes it would be helpful in addressing the issues raised in this case.

## STATEMENT OF POINTS AND AUTHORITIES

## STATEMENT OF THE CASE

Eighth-grader B.H. and his girlfriend, seventh-grader C.W., had been dating each other for a year and a half before they decided to have sex. (*See*, Juvenile Sexual Offender Assessment[1], Record at 93-100; "Voluntary Statement" of [C.W.] Record at 14-16.) They had sex twice at C.W.'s house when no one else was home. ("Voluntary Statement," Record at 14-16.) B.H. also sent two nude pictures of himself to C.W., and she sent him one back. (Voluntary Statement," Record at 14-16.) According to David Breeding, a service provider with decades of experience in treating both sexual offenders and victims of sexual abuse, relations of this sort are not atypical within this age group, and B.H. and C.W.'s relationship was an age-appropriate one. (AR 10-26-11 at 2:58:20 – 2:59:40; 3:19:00 -3:19:26.) Such actions, when performed by teenagers like B.H. and C.W., are not necessarily based on "devi[ant] sexual arousal," Breeding also noted. (AR, 10-26-11 at 2:48:30 - 2:49:20.)

B.H.'s troubles began when C.W.'s parents found the nude pictures on their daughter's phone. (*See,* JSO Assessment, Record at 93-100.) For having sex with his girlfriend, B.H. was charged with Sexual Misconduct. For having a nude picture of his girlfriend, he was charged with Possession of Matter Portraying Sex Performance By Minor[2]. (*See*, Juvenile Complaint, Record at 7.) On May 11, 2011, B.H. entered a guilty plea to Sexual Misconduct and an amended charge of Attempt, Possession of Matter Portraying Sex Performance By Minor, which is also a misdemeanor. (Audio Record[3], 5-11-11 at 9:34:57 – 9:35:34.) Although neither B.H. nor C.W. are considered old enough

[1] Hereinafter "JSO Assessment."
[2] Although this is the term used both in the Juvenile Complaint and the trial court's docket sheet, the official statutory term is "Possession or Viewing of Matter Portraying a Sexual Performance by a Minor."
[3] Hereinafter "AR"

to legally consent to sex, (*see,* KRS 510.020(3)(a)) only B.H. was charged with a public offense. Although both teenagers sent and received nude pictures to each other on their phones, only B.H. was charged with a public offense.

**The Dispositional Hearing**

Pleading guilty to the amended misdemeanor meant that, among other things, B.H. was no longer automatically required to be designated a Juvenile Sex Offender ("JSO.") KRS 635.510(1). However, he could still be designated as a JSO if the trial court, in its discretion, chose to designate him as such. *See,* KRS 635.510(2)(b). Designation as a JSO results in mandatory commitment to DJJ. *See,* KRS 635.515 (1.)

At B.H.'s dispositional hearing on October 26, 2011, one of the arguments made by trial counsel in support of the position that B.H. should not be committed to DJJ as a JSO was that B.H. and his girlfriend were close in age and were *both* in an age group where *neither* could consent to sexual contact. (AR 10-26-11 at 4:12:15 - 4:12:54.) Just as C.W.'s parents had filed charges, B.H.'s mother could have gone to the County Attorney and alleged the same facts, trial counsel noted. (*Id.*) Counsel also noted the fact that both B.H.'s phone *and* C.W.'s phone had nude images on them. (*Id.*)

Ultimately, the Woodford District Court decided to designate B.H. as a JSO and commit him to DJJ. On the basis of that commitment he was removed from his home and placed in a Youth Development Center. An appeal to Woodford Circuit Court followed in which the Circuit Court upheld the ruling of the District Court. The Kentucky Court of Appeals denied B.H.'s Motion for Discretionary Review on March 20, 2013. Additional facts will be developed as necessary.

## ARGUMENT

## I.

## KRS 510.140 IS UNCONSTITUTIONAL AS APPLIED TO A CHILD ENGAGING IN CONSENSUAL SEXUAL ACTIVITY WITH A PEER; FURTHERMORE, THE COMMONWEALTH DID NOT INTEND TO CRIMINALIZE SUCH BEHAVIOR WHEN *BOTH* PARTIES ARE UNDER THE AGE OF CONSENT

This issue was not properly preserved for appellate review at the trial level. Nevertheless, the Woodford Circuit Court reviewed the legal issues in this case *de novo* on appeal, and B.H. urges that this Court should do the same. Furthermore, the error is also palpable and may additionally be reviewed in the absence of an objection, under RCr 10.26, due to the child ultimately being deprived of his liberty and being designated as a JSO.

### A. KRS 510.140 is Unconstitutional as Applied

B.H .is challenging KRS 510.140 as being unconstitutional as applied to him. The U.S. Supreme Court has recognized the validity of such "as-applied" challenges. "A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts." *U.S. v. Eichman*, 496 U.S. 310, 312 (1990). The "as-applied" in the current case means that B.H. "contends that the application of the statute in the particular context in which he has acted… [is] unconstitutional." *Ada v. Guam Soc. of Obstetricians and Gynecologists*, 506 U.S. 2011, 2011 (1992). B.H. does not contend that KRS 510.140 is facially unconstitutional or unconstitutional as applied to adults; rather, B.H. contends that the statutes are unconstitutional when applied to minors who, like himself, are within the class of persons protected by the statute.

The statute is unconstitutional as-applied to B.H. for two reasons. First, the statute as applied to minors of B.H.'s age violates B.H.'s Constitutional right to Due

Process. Second, the statute has been applied to B.H. in contravention of his Constitutional right to Equal Protection.

1) **Due Process**

a) **The Application of KRS 510.140 to B.H. Violates His Fundamental Right to Privacy, and Thereby Violates His Constitutional Right to Substantive Due Process.**

*U.S. Const. Amend. XIV,* §1 states in part that all individuals are to be granted "due process of law." This basic principle is also contained in §3 of the Kentucky Constitution. Juveniles such as B.H. are to be afforded the same due process protections as adults. *Kent v. United States* (1966), 383 U.S. 541, 562, 86 S.Ct. 1045, 16 L.Ed.2d 84,citing *Green v. United States*, 113 U.S.App.D.C. 348, 308 F.2d 303 (1962). Due process can be divided into two categories: 1) substantive due process, which addresses rights so fundamental that the government must have an exceedingly important reason to regulate them, if at all, such as the right to free speech or to vote; and 2) procedural due process, which requires government to follow known and established procedures, and not to act arbitrarily or unfairly in regulating life, liberty or property. *See, Miller v. Johnson Controls, Inc.,* 296 S.W.3d 392, 397 (Ky. 2009.) In the current case, KRS 510.140 as applied to B.H. violated substantive due process.

The current case involves two teenagers, both under age sixteen, having sex with each other. The freedom to engage in sexual acts with a peer is clearly a liberty interest that is to be afforded Constitutional protections. *Commonwealth v. Wasson*, 842 S.W.2d 487, 497 (Ky., 1992) (citing *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) for the position that "the liberty interest involved in the sexual act made its punishment constitutionally impermissible.")

In *Wasson,* this Court held that the right to privacy as contemplated in the laws and Constitution of this Commonwealth, extended to acts involving consenting adults engaging in homosexual activity. *Id* at 493-496. When a statute seeks to regulate behavior related to the right to privacy this triggers a substantive due process analysis. *Id* at 493. Accordingly, in order for The Commonwealth to be able to continue to apply KRS 510.140 in the manner it has against B.H., the Commonwealth must establish that doing so passes Constitutional muster.

**i.) <u>Strict Scrutiny Applies</u>**

The application of KRS 510.140 to B.H. affects a "fundamental right," (the right to privacy), and accordingly must be afforded strict scrutiny review. *D.F. v. Coddell,* 127 S.W.3d 571, 575, (Ky. 2003), citing *Zablocki v. Redhail,* 434 U.S. 374, 387, 98 S.Ct. 673, 681, 54 L.Ed.2d 618, 631 (1978.) In *D.F.,* this court noted that "[u]nder this highest standard of review, the challenged statute can survive only if it is suitably tailored to serve a 'compelling state interest.'" *Id at* 575, citing *Steven Lee Enterprises v. Varney,* 36 S.W.3d 391 (Ky.,2000) at 394.

In the current case, then, the Commonwealth must establish that KRS 510.14 as applied to B.H. is tailored in such a way as to serve a "compelling state interest." *Id.* While this Commonwealth may indeed have a legitimate interest in regulating some teenage sexual behavior, the statute as applied to BH is not "suitably tailored" to meet such that interest. *See, D.F.* at 575. As will be discussed further *infra*, it was not even the intent of the legislature to attach criminal liability to consensual sexual activity between children when *both* individuals involved are under the age of sixteen. This Commonwealth has set sixteen (16) as the threshold age at which children are deemed to

have sufficiently matured socially, psychologically, emotionally, and physically to be able to consent to sex. *See, Kentucky Crime Commission/LRC Commentary to KRS Chapter 510* (1974.) The application of KRS 510.140 to children such as B.H. is not suitably tailored to meet any possible compelling interest of this Commonwealth. It subjects such children to designation as a public offender, possible designation as a JSO (and indeed, B.H. *was* designated as a JSO), and the potential for being placed out of the community and in the secure custody of DJJ (which also happened in this case.)

To the extent that this Commonwealth may have a "compelling interest" in regulating sex amongst teen peers under the age of sixteen (16), there exist other laws that are more "suitably tailored" to address such concerns, e.g., the Status Offender provisions of the Juvenile Code. For instance, in the current case, B.H. and his girlfriend C.W. could have both been charged with Beyond Control of Parent under KRS 630.020 (2), and then following an adjudication could have been ordered at disposition to take classes on sexual boundaries, appropriate peer interactions, and so forth.

**b) KRS 510.140 As-Applied to B.H. Also Violated His Due Process Rights as Being Void for Vagueness.**

In addition to the above substantive due process concerns, KRS 510.140 as applied to B.H. also violated his due process rights because the statute is unconstitutionally vague. Under the void-for vagueness doctrine, "[t]o satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling v. U.S.,* 561 U.S. 358, 402-403, 130 S.Ct. 2896,177 L.Ed.2d 619 (2010), citing *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

In the current case, KRS 510.140 as applied to B.H. fails the second prong of this test. KRS 514.140 as applied to B.H. is impermissibly vague under the Fourteenth Amendment because the use of the statue as applied "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480 (U.S.,2000), citing *Chicago v. Morales,* 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). *See also State Bd. for Elementary & Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992.)

When B.H. and C.W. had sex, they were both under sixteen (16), and therefore unable to consent to sexual behavior under the law. Yet the Commonwealth elected to charge B.H. as the public offender, and designate C.W. as the victim. This raises Equal Protection concerns that will be discussed *infra*, but for the purposes of this section, it suffices to say that such an action also constituted an arbitrary and discriminatory enforcement of the law. Such a decision cannot be defended as merely an exercise of "prosecutorial discretion" when the "crime" charged consists of an activity that the two primary actors are engaging in *with each other.* In such instances, charging one actor and not the other constitutes arbitrary and discriminatory enforcement. *See, D.B. v. Commonwealth*, 129 Ohio St.3d 104,110; 950 N.E.2d 528, 534 (Ohio, 2011.) (Attached, Appendix ___.), further discussed *infra.*

It should be noted that other provisions of Kentucky law support the idea that sexual acts constitute actions in which both parties are inextricably involved. The Commentary to Kentucky's conspiracy statute, KRS 506.040 lists as an exemption any offense that is "so defined that an offender's co-party is necessarily involved in the commission of the offense." *Id.* The example given in the Commentary of such an

offense is statutory rape. *Id.* The basic purpose of Kentucky's Sexual Misconduct Statute, as stated in the Commentary to KRS 510.140, is: "to preserve the concept of statutory rape and statutory sodomy." *See,* Commentary to KRS 510.140. It is important to note that in the current case, *both* children were similarly-aged peers, *both* were members of a protected class, and were engaging in consensual sex. The acts of B.H. and C.M. are inextricably and intimately intertwined.

KRS 510.140 contains no guidelines or instructions on how it is to be enforced when *both* parties are unable to consent due to their age. It is a long-established principle, not only in Kentucky, but in the entire nation, that laws must be clear and establish "minimal guidelines" on enforcement. *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, (U.S. Mass. 1974.) Accordingly, KRS 510.140 is unconstitutionally void for vagueness as applied to B.H.

**2.) <u>KRS 510.140 as Applied to B.H. Violates His Right to Equal Protection</u>**

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mandates that similarly circumstanced individuals be treated alike. *U.S. Const. Amend. XIV,* §1; *see also Cain v. Lodestar Energy, Inc.,* 302 S.W.3d 39, 42 (2009.) (citing *City of Cleburne, Texas v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 320 (1985).) The Commonwealth is obligated under this clause to not "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV,* §1. Equal Protection to all citizens of the Commonwealth of Kentucky is also guaranteed under Section 2 of the Kentucky Constitution (as well as Sections 1, 3, and 59). Section 2 of the Kentucky Constitution reads, "Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a

republic, not even in the largest majority." *Id.* Section 2 of the Kentucky Constitution has been held to encompass both the federal principles of due process and equal protection.*Kentucky Milk Marketing and Antimonopoly Com'n v. Kroger Co.*, 691 S.W.2d 893, 900. (KY 1985) (citing *Pritchett v. Marshall,* Ky., 375 S.W.2d 253, 258 (1963).) KRS 510.140 as applied to B.H. violated his constitutional right to Equal Protection.

**a) <u>Both children members of the "protected class"</u>**

B.H. and his girlfriend C.W. are both incapable of giving consent to sexual activity due to their age. KRS 510.020(3)(a). There is no dispute that B.H. and C.W. had sex, and it is clear that the sex was consensual. Yet B.H.is painted as villain, C.W. as victim. KRS 510.140 was "designed primarily to prohibit nonconsensual sexual intercourse" in two specific circumstances. (*See,* Kentucky Crime Commission/LRC Commentary to KRS 510.140.) One of those two circumstances is "when the victim is 12,13,14, or 15 and the defendant is less than 18 years of age." (*Id.*) Both B.H.'s and C.W.'s ages place them within the "victim" age range. Neither of their ages place them in the range where they are *both* "less than 18 years of age," (KRS 510.140) *and* also of the age of being able to "consent" to sexual activity under the law. KRS 510.020(3.)

As both B.H. and C.W. are defined as victims under the statute, the Commonwealth cannot elect to charge one of them with the crime and not the other without running afoul of Equal Protection. In the neighboring state of Ohio (which, sadly, often shares juvenile clients with this Commonwealth due to sharing a common border), the Ohio Supreme Court recently held that it was unconstitutional to criminally charge a child who was himself legally unable to consent when he engaged in sexual conduct with a same-aged peer. *See, D.B. v. Commonwealth*, 129 Ohio St.3d 104,110; 950 N.E.2d 528,

534 (Ohio, 2011.) (Attached, Appendix Tab 1). The Court noted that in such instances, "each child is both an offender and a victim, and the distinction between those two terms breaks down." *Id* at 108. While the *D.B.* Court found the statute in that case to be unconstitutional on several grounds, one of the specific findings that the *D.B.* Court made was that it was a violation of Equal Protection to charge only one of the children involved. *Id* at 110.

**B.) <u>The Kentucky Legislature Did Not Intend with KRS 510.140 to Criminalize Sexual Behavior Between Similarly-Aged Peers Both Under the Age of Consent.</u>**

In *Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998), this Court said "a statute should not be interpreted so as to bring about an absurd or unreasonable result." Yet that is exactly what has happened in the current case. Under Kentucky law, *both* B.H. and C.M. are incapable of consent to sexual activity. KRS 510.020(3)(a). Accordingly, neither should be able to be held criminally liable in an instance of engaging in consensual sex with a fellow minor. B.H. and C.W. are *both* in the class of individuals that the Commonwealth seeks to protect with KRS 510.140 (i.e. minor children under the age of sixteen (16)), and the law asserts that children of B.H.'s age are unable to consent to sex. It is improper and legally unjustifiable to then permit the Commonwealth to perform a complete 180 degree turn and assert that that same child is somehow able to appreciate the full gravity of, and be criminally liable for, the very behavior that the Legislature found he is too young to consent to. The Commonwealth's prosecution of B.H. under the very same laws drafted to protect him has led to a result that the Legislature clearly never intended.

In order to promote justice and effect the objects of the law, this Court should construe KRS 510.140 as not applying to sex between a boy who had just turned fifteen and his thirteen-year-old girlfriend, as *both* children are defined as being unable to consent, under the law.

**1) Sexual Misconduct Was Not Prosecuted Against Juveniles At All Prior to the Adoption of the Kentucky Penal Code**

Generally, Kentucky's juvenile laws that in were in existence prior to the adoption of the Penal Code in the early 1970's did not permit criminal prosecution of a juvenile unless: (a) the child was accused of a felony offense and over the age of sixteen, or (b) the child was accused of murder or rape. KRS 208.170(1) (1963.) KRS 435.100 (1963) made unlawful intercourse with a child under the age of twelve a violation[4] where the defendant was under the age of twenty-one. The practical effect of these provisions was that at the time Kentucky's Penal Code was adopted, no juvenile B.H.'s age could have been prosecuted criminally for consensual sexual intercourse with his thirteen-year-old girlfriend, or vice versa.[5] The General Assembly, when considering the Penal Code, had no reason to believe that such youth would be subject to criminal prosecution under the previous system, and accordingly, did not address this matter directly when drafting the new Penal Code.

**2) Kentucky Penal Code Makes Sixteen the Age of Consent**

In developing the rape statutes, the Kentucky Crime Commission concluded that

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[4] The terminology in use at the time characterized it as a misdemeanor, but the statute itself provided only for a fine of $500 for the violation.

[5] It must be noted that it is unclear as to what *non-criminal* penalties children in such situations would have faced, if any, in the juvenile court system prior to the adoption of Kentucky's Penal Code. However, what is clear is that the drafters of the Penal Code had no reason to believe that any child would find themselves facing a criminal prosecution for an otherwise consensual act based on the ages they identified in KRS Chapter 510.

teenage children under the age of sixteen are never capable of consenting to sexual contact. KRS 510.020(3)(a). *See also Kentucky Crime Commission, Commentary to KRS Chapter 510*, (1974); *See also Payne v. Commonwealth*, 623 S.W.2d 867 (Ky., 1981.) Consent is not defined in the Code, but refers to a "voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another." *Black's Law Dictionary, 6th Edition*, pg. 305 (West, 1990). In the context of sexual crimes, consent requires "an exercise of intelligence based on knowledge of [the sexual act's] significance and moral quality." *Id.* Clearly, the drafters of KRS 510.140 considered young juveniles such as B.H. to be incapable of exercising the moral judgment needed to intelligently participate in sexual conduct and utterly incapable of appreciating the full consequences of their actions.

At the time the newer law was drafted, a child under the age of sixteen could not have been found guilty of any sort of sexual crime for activities involving another child under the age of sixteen. It therefore flies in the face of reason to argue that the Legislature intended, in drafting KRS 510.140, to permit the prosecution of children under the age of sixteen for engaging in sexual activity with similarly-aged peers who are also under sixteen. Such is the very picture of an "absurd or unreasonable result." *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.* at 500.

In *Wasson,* already discussed *supra,* this Court noted in that case that a case from the Pennsylvania Supreme Court was "particularly noteworthy because of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790. Decisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own." *Wasson*

at 498. In the current case, B.H. would urge that this Court again look to Pennsylvania, but this time as to the issue of statutory interpretation. In the case *In the Interest of B.A.M.*, 806 A.2d 893 (PA Super. Ct. 2002) (Attached, Appendix Tab 2), the Pennsylvania Superior Court specifically addressed the circumstance of sexual behavior between two children who were both incapable of consent under Pennsylvania's laws, and held that finding such a child guilty of rape was an improper application of the law, and was not within the intent of the Legislature when the law was enacted. *Id* at 898. The Court in *B.A.M.* noted that when a child is legally incapable of consent, "he or she must be presumed, absent clear evidence to the contrary, to be equally incapable, in any sense implicating criminal liability, of initiating such conduct." *Id.*

## II.
## KRS 531.335 IS UNCONSTITUTIONAL AS APPLIED TO A CHILD ENGAGING IN CONSENSUAL SEXUAL ACTIVITY WITH A PEER; FURTHERMORE, THE COMMONWEALTH DID NOT INTEND TO CRIMINALIZE SUCH BEHAVIOR WHEN *BOTH* PARTIES ARE MEMBERS OF THE CLASS THE STATUTE IS INTENDED TO PROTECT

This issue was not properly preserved for appellate review at the trial level. Nevertheless, the Woodford Circuit Court reviewed the legal issues in this case *de novo* on appeal, and B.H. urges that this Court should do the same. Furthermore, the error is also palpable and may additionally be reviewed in the absence of an objection, under RCr 10.26, due to the child ultimately being deprived of his liberty and being designated as a JSO.

### A) KRS 531.335 is Unconstitutional as Applied to B.H.

All of the previous arguments *supra* regarding "unconstitutional as applied" challenges to a statute regarding KRS 510.140 apply equally to KRS 531.335. B.H. also

asserts, as with KRS 510.140, that the statute is unconstitutional as-applied to B.H. for two reasons. First, the statute as applied to minors of B.H.'s age violates B.H.'s Constitutional right to Due Process. Second, the statute has been applied to B.H. in contravention of his Constitutional right to Equal Protection. As KRS 531.335 involves slightly different elements and issues, however, additional analysis and argument follows.

1) **KRS 531.335 as Applied to is a Violation of his Substantive Due Process Rights**

The application of KRS 531.335 to B.H., which was used to prosecute him as a public

offender, was in direct violation of his substantive due process right to freedom of speech. *See, Miller v. Johnson Controls, Inc.,* 296 S.W.3d 392, 397 (Ky. 2009.) In the current case, B.H. and C.W. sent and received nude text message from each other, an action which, when conducted by two similarly-aged teens, is arguably protected speech under the First Amendment. Prosecution via a statute that constitutes a content-based restriction speech that is to be subject to strict scrutiny analysis. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 (U.S.,2000),citing *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989.)

It must be noted that in the case of adults abusing children, child pornography is not to be afforded any First Amendment Protections. *See, New York v. Ferber*, 458 U.S. 747, 757, (stating "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.") However, when children themselves are the ones both producing and receiving the images in question, especially

when such images are shared solely between two juveniles in a romantic relationship, a different analysis must be applied.

The governmental interest in of prohibiting child pornography is linked to one of three main goals: "to prevent the abuse of children, to prevent victims from being "haunted," or to "dry up" the market for child pornography." (*See*, Dr. JoAnn Sweeny, "Sexting and the Freedom of Expression: A Comparative Study," 102 Ky. L.J. 103, 118 (2014), attached Appendix Tab 3.) [6]

However, such goals are not applicable to cases of teens sexting each other. The preventing abuse prong does not apply, as sexting between teens does not involve teens suffering harm from adults or even from each other. *Sweeny* at 118-121. Preventing victims from being "haunted" does not apply, as the humiliation a teen might feel at a sext being disseminated does not rise to the same level of harm as a child being re-traumatized every time the image of a previous abuse at the hands of an adult is disseminated. *Sweeny* at 121-123. Finally, the goal of "drying up the market" does not apply, as the majority of sexting done by teens are either not shared at all (outside of the couple doing the sharing with each other), or are only shared with other teens, as opposed to adults. *Sweeny* at 123-125. Accordingly, sexting that occurs between juveniles should be afforded First Amendment protection, and KRS 531.335 as applied to B.H. should fail under a strict scrutiny analysis.

Yet even in cases involving adults and child pornography, the statute being challenged is to be examined under intermediate scrutiny, and must be "reasonably tailored" to address the government's "substantial" interest in protecting children. *See, Connection Distributing Co. v. Holder*, 557 F.3d 321, 328-329 C.A.6 (Ohio, 2009.) As

[6]. Hereinafter "Sweeny."

applied to B.H., KRS 531.335 does not, for all the reasons discussed *supra*, pass Constitutional muster under even this less-stringent standard.

2) **KRS 531.335 as applied is also a Violation of B.H.'s Due Process Rights Due to Being Void for Vagueness**

B.H. and C.W. were both members of the protected class for the purposes of charges brought under KRS 531.335, albeit under different provisions of the law than for KRS 510.140. (*See,* KRS 500.080, in conjunction with KRS 2.015, defining "minor" in this context as anyone under the age of 18.) B.H. had a nude photo of C.W. on his phone, and C.W. had nude photos of B.H. on her phone. If KRS 531.335 is to be interpreted as saying that minors can themselves be charged for having nude pictures of their similarly-aged paramours on their phones, then *both* parties could have been charged.

Yet again, just as with KRS 510.140 discussed *supra*, KRS 531.335 also does not contain any guidelines or directions as to how the statute is to be enforced when children who are both within the intended protected class choose to engage in such conduct with each other. The male B.H. was charged, the female C.W. was not. Without any proper guidelines for enforcement in such instances, the law as applied can lead to arbitrary and discriminatory enforcement, and is impermissibly void for vagueness. *See, Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, (U.S. Mass. 1974.); *See also Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480 (U.S.,2000), citing *Chicago v. Morales,* 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); and *State Bd. for Elementary & Secondary Educ. v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992.)

KRS 531.335 is unconstitutionally void as-applied to B.H. because the statute encourages discriminatory enforcement, as applied to minors like B.H., due to the distinction between offender and victim being irreparably blurred.

### 3) KRS 531.335 As-Applied Violated B.H.'s Equal Protection Rights

The fact that *either* B.H. or C.W. could be charged with a crime for "sexting" their significant other, when no adult would suffer a similar fate if sexting another adult, raises serious Equal Protection concerns as well. B.H. re-asserts the general Equal Protection principles as already stated in Section A, Part 2 of Argument 1 in this brief, but makes the following additional points:

#### a) The Equal Protection Analysis Must Include Consideration of Established Facts Regarding Teenagers and Technology

"[A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper v. Simmons*, 543 U.S. 551,569; 125 S.Ct. 1183,1195 (U.S.Mo.,2005.), citing *Johnson v. Texas*, supra, at 367, 113 S.Ct. 2658 and *Eddings v. Oklahoma*, supra, at 115–116, 102 S.Ct. 869 ("Even the normal 16–year–old customarily lacks the maturity of an adult.")

In *Roper* and subsequent cases such as *Graham v. Florida*, 130 S. Ct. 2011 (U.S., 2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (U.S. Ala., 2012), the United States Supreme Court has consistently recognized that children are different than adults. Their brains work differently. They engage in impulsive, immature and irresponsible behavior. The current generation of "plugged–in" youth have Facebook, Twitter, InstaGram, SnapChat, and probably many others that counsel is not even aware of. SnapChat is especially germane to the case at hand, as it allows users to

send photos to other individuals that will then disappear within a set time period pre-determined by the sender, à la *Mission Impossible.*[7]

Todays' teens have phones that can fit in their pocket, with the ability take pictures with the click of a button. With another click, those photos can be sent via the Internet to their friends and significant others within seconds of being taken. There is no chance to think about the possible future repercussions. Just point, click, and send. The technology is unfortunately the perfect match for impulsive teenage minds. More than half of all American teenagers use texting at a rate higher than all other forms of communication, with one in three teens sending more than one hundred text messages a day, and fifteen percent of teens sending more than two hundred texts a day.[8] The impulsive nature of teenagers, combined with the incredible rate at which they text, has, in a number of instances, led to teens "sexting" each other, with little to no thought as to the possible long-term consequences of their actions, especially not the idea that it could lead to being branded a sex offender. Indeed, Breeding testified that such sexting is normative behavior for teenagers of B.H. and C.W.'s age. "[T]hat's big right now. A lot of kids are doing that." (AR 10-26-11 at 3:25:23 - 3:25:58.)

The increasing number of teens engaging in sexting these days underscores the problem with the Commonwealth trying to treat juveniles as criminals under KRS 531.335. "According to a recent poll, one in four American teens could be legally labeled a child pornographer." *Sweeny* at 103.

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[7] See *Forbes* article on Snapchat, online at http://www.forbes.com/sites/jjcolao/2014/01/06/the-inside-story-of-snapchat-the-worlds-hottest-app-or-a-3-billion-disappearing-act/

[8] See Pew Research Center article, "Teens, Cell Phones and Texting," online at http://pewresearch.org/pubs/1572/teens-cell-phones-text-messages.

This particular poll placed the number of teens engaging in sexting at nearly thirty (30) percent. *Sweeny* at 103. A comparison of a Pew Research survey conducted in 2009 with more recent statistics shows rising numbers of teens engaging in sexting, with numerous studies showing figures of more than a quarter of all teens engaging in sexting, some almost as high as one *third* of all teens. *Sweeny* at 108. "There is no indication that these numbers will decrease as even more teens gain access to cellular phones and other digital media," Dr. Sweeny wrote. *Id.*

Sexting, whether one uses Twitter, SnapChat, or even the more "old-fashioned" method of phone-to-phone texting with *no* auto-delete function, has, regrettably, become a form of self-expression for many teens. The statistics presented *supra* indicate that B.H.'s and C.W.'s actions in taking nude photos of themselves and sending them to each other, is, unfortunately, becoming normative behavior within the juvenile population.

**b. Adult "sexting" does not carry criminal penalties**

Then again, sexting has also, lamentably, become fairly normative behavior within the adult population as well, with at least one recent study placing the percentage at nearly fifty percent for adults.[9] Perhaps the most high-profile sexting case involving an adult has been that of former U.S. Congressman Anthony Weiner, who resigned his post after confessing that he had sexted several adult women.[10] Later, Mr. Weiner ran for mayor of New York, but lost, amidst reports that he had continued to engage in sexting with women *after* the scandal that had caused him to resign as Congressman.[11]

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[9] See summary of McAfee Labs study at: http://blogs.mcafee.com/consumer/love-and-tech?culture=en-us&affid=0&cid=140623

[10] A news story on this matter may be found online at http://www.washingtonpost.com/pb/politics/anthony-weiner-to-resign-thursday/2011/06/16/AGrPONXH_story.html

[11] A news story on this matter may be found online at http://www.politico.com/story/2013/07/anthony-weiner-apology-94626.html

However, while the former Congressman's sexting did unquestionable damage to his political career (and, presumably, to his marriage as well), he did not find himself in jail over his actions. This is because Mr. Weiner's actions were not crimes under the law; he did not send naked pictures to, nor solicit naked pictures from, a child who was B.H. or C.W.'s age, which would have been a crime for an adult such as Mr. Weiner to engage in. When an adult sends or solicits nude photographs to or from a child, or otherwise uses them in a sexual performance, they are properly subject to punishment under our laws, because of the state's compelling interest in protecting children. *See*, *Ferber* at 757. However, when children themselves are the ones both producing and receiving the images in question, such justification disappears. (See previous discussion in Section 1 of this Argument, *supra*.)

Criminalizing children who are both the producers and receivers of nude images of themselves or other children, when similarly situated adults cannot be prosecuted for engaging in such behavior with other adults, is not proper. There is no compelling state interest that exists to override these children's right to produce and distribute such material amongst each other, especially when such behavior is done within the context of a same or similarly-aged romantic relationship. Accordingly, applying a statute in such a way as to criminalize a child for having a girlfriend his own age or nearly his own age, and sharing intimate photographs with her, clearly violates such a child's rights to Equal Protection under the law. *U.S. Const. Amend. XIV,* §1.

**B) <u>The Kentucky Legislature Did Not Intend for KRS 531.335 to Be Used Against the Very Children It Was Drafted to Protect</u>**

The Kentucky Legislature, when drafting KRS 531.335, clearly intended to protect minors from being used for sexual exploitation by adults. In interpreting a similar

statute, KRS 531.310 (prohibiting the use of a minor in a sexual performance), the Kentucky Supreme Court said in *Payne v. Commonwealth*, 623 S.W.2d 867, 871 (Ky., 1981) that "[t]he primary purpose of the Kentucky statute relating to sexual exploitation of minors is clearly to protect children from the conduct of being used in a sexual performance." *Id.* It is important to note that on the federal level, statutes related to criminal prosecution for the distribution and possession of child pornography also have the same goal of protecting children from loathsome adult predators. *Sweeny* at 118, citing to the Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. § 2251 (2012).)

As noted *supra*, for the purposes of KRS 531.335, a "minor" is defined as anyone under the age of eighteen (18.) *See,* KRS 500.080, in conjunction with KRS 2.015. Accordingly, B.H. and C.W. fall under the category of "minors" that the Legislature sought to protect from exploitation from adults. Yet in the current case, neither child was being exploited by an adult. They were "sexting" within the context of a teenage romantic relationship. To allow KRS 531.335 to be interpreted in such a way that lumps teenagers sending nude pictures to each other in the exact same category as adult predators who prowl Internet chat rooms looking for their next child victim, is the very definition of an "absurd or unreasonable result." *Kentucky Indus. Utility Customers, Inc.* at 500.

The Legislature clearly did not intend for children to be charged with a crime for exchanging nude images with their similarly-aged boyfriends and girlfriends. Indeed, it is safe to say that it is highly unlikely that the Legislature contemplated the *possibility* of teenagers sending "sexts" to one another. It is important to note that KRS 531.335 was

drafted in 1992, before the widespread use of cell phones and picture texting, and long before terms such as "social media" and "sexting" had even entered the modern lexicon.

## CONCLUSION

B.H. asserts that the Commonwealth's prosecution of him under KRS 510.140 and KRS 531.335 violated his Constitutional rights to Due Process and Equal Protection. The statutes are unconstitutional as applied to him. Furthermore, B.H. contends that the Kentucky Legislature never intended these statutes to be used to prosecute children who fall under the very class of individuals the laws were drafted to protect.

For the foregoing reasons, B.H. requests that the charges against him be dismissed, and the lower court's judgment be vacated.

Respectfully submitted,

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# APPENDIX

| Tab Number | Item Description | Record Location |
|---|---|---|
| 1. | Order denying Motion for Discretionary Review 2012-CA-1768 | N/A |
| 2. | Opinion and order Case No. 11-XX-00001 Woodford Circuit Court 09-J-00050-004 | N/A |
| 3. | *D.B. v. Commonwealth*, 129 Ohio St.3d 104, 950 N.E.2d 528 (Ohio, 2011) | N/A |
| 4. | *In the Interest of B.A.M.*, 806 A.2d 893 (PA Super. Ct. 2002) | N/A |
| 5. | Dr. JoAnn Sweeny, "Sexting and the Freedom of Expression: A Comparative Study," 102 Ky. L.J. 103, 118 (2014) | N/A |